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Twenty-eighth session

SUMMARY RECORD OF THE 552nd MEETING

Held at the Vienna International Centre, Vienna,
on Thursday, 4 May 1995, at 2 p.m.

Chairman: Mr. GOH (Singapore)

Chairman of the Committee of the Whole: Mr. GAUTHIER (Canada)

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The meeting was called to order at 2.10 p.m.

DRAFT CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT (*continued*) (A/CN.9/405, A/CN.9/408 and A/CN.9/411)

Article 8 (*continued*) (A/CN.9/408, annex)

1. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) restated the question under discussion and asked the Commission to consider an approach whereby the article would state that an amendment had to be in a form stipulated, that the consent of the beneficiary was required and that the amendment would have no effect on the rights and obligations of the principal/applicant or of a confirmer unless they had given their consent. The article should also leave open the possibility of providing otherwise.

2. **Mr. CHOUKRI SBAI** (Observer for Morocco) said that a similar proposal had been before the Committee, namely, to retain the existing text and leave the initiative to the guarantor but to add a passage to state that the amendment would not be considered final unless the beneficiary consented. In that way, the guarantor would have the initiative but that initiative would not be accepted or final without the consent of the beneficiary.

3. **Ms. CZERWENKA** (Germany) believed that a mere statement that consent was required would be a backward step. If the question of when the amendment became effective were not regulated in the Convention, it would be subject to national law, so that there would be no uniformity. She believed that the Committee had been very close to agreement on the question of the time of effectiveness and would regret it if the question were left open.

4. **Mr. LAMBERTZ** (Observer for Sweden) supported the proposal made by the Chairman of the Committee of the Whole. He was not convinced that uniformity was necessary, a point that had been made earlier by a number of delegations.

5. The question of the time of effectiveness had been discussed at length and it was difficult to find a better solution than that proposed. States might wish to adopt more precise rules in their national laws, though he was not convinced that his country would wish to do so.

6. **Mr. FAYERS** (United Kingdom) said that he shared the Swedish view though he rather agreed with the representative of Germany that the statement was merely one of principle and that it would not achieve much progress towards uniformity, though uniformity might not be necessary in practice. The Secretary had cogently put the question whether retroactive provisions were necessary. The Commission had been close to accepting article 8 (2) with the deletion of subparagraph (b). He would be prepared to support that proposal or even the inclusion of both subparagraphs (a) and (b) if it could be shown to be necessary that the matter should be dealt with in the Convention rather then left to the market.

7. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) noted that no delegation seemed to favour a reference to retroactive effect in the article. It would therefore seem that on balance a text on the lines of paragraph (2), without subparagraph (b), would suffice. That would leave the provision in line with UCP rules.

8. *It was so agreed.*

Article 9 (A/CN.9/408, annex)

9. **Mr. EDWARDS** (Australia) proposed that the words "if so, and" in paragraph (1) be deleted. That would make the wording simpler and more consistent with the reference to the same concept at the end of paragraph (2).

10. **Mr. FAYERS** (United Kingdom) said he thought it had been agreed that the passage in paragraph (1) should read "if authorized in the undertaking and only to the extent and in the manner set out therein". Perhaps the Secretary could clarify the question.

11. **Mr. HERRMANN** (Secretary of the Commission) explained that paragraph (1) was intended as a provision limiting the possibility of a transfer, to cover those cases in which a transfer was authorized and those in which it was not, while paragraph (2) covered cases in which there was an authorization of transfer — a transferable instrument — so that "only if" would be illogical there. The form of words suggested by the United Kingdom seemed to be preferable.

12. **Ms. CZERWENKA** (Germany) said that the question was not the extent to which the beneficiary's right to demand payment could be transferred but whether that right could be transferred at all. She would support the text as it stood, subject to possible drafting improvements.

13. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) asked if he could take it that there was agreement in principle that transferability must be authorized in the undertaking and that the extent and manner of transfer were secondary matters. On that assumption, the text could be passed to the drafting group.

14. **Mr. VASSEUR** (Observer for Monaco) said he could understand that the transferability of an undertaking required to be authorized. However, partial transfers existed and he asked for an explanation of the phrase "in the manner authorized".

15. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) explained that the basis was article 49 (c) of the ICC Customs and Practice.

16. **Mr. KOZOLCHYK** (United States of America) noted that, in his summing up, the Chairman had mentioned the principle of the transferability of an undertaking and the question of its manner and extent. However, there seemed to have been no reference in the Chairman's remarks to the consent of the issuer.

17. In reply to the question raised by the observer for Monaco, he explained that the term "extent" referred to whether transferability was partial or not, and the term "manner" referred to the mechanism used, such as the issuance of another credit.

18. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) explained that he had been referring only to paragraph (1). He had not suggested deletion of paragraph (2), which referred to the question of consent.

19. **Mr. LAMBERTZ** (Observer for Sweden) said he had been asked by Professor Hâstad, of Sweden, who had studied the draft, to raise the question whether, in the event of insolvency of the beneficiary, the undertaking as an asset could be divided up among the creditors of the beneficiary if it were not transferable.

20. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) noted that the principle embodied in paragraph 9 (1) had been agreed upon and that the text would be passed to the drafting group. The question raised by Monaco had been answered. He appreciated the point made by the observer for Sweden regarding insolvency but was not convinced that the law on insolvency was uniform world-wide and doubted whether that question could be handled in the context of the Convention. In any case, the Commission would be discussing insolvency later in the current session. Since there were no comments on the question of insolvency he assumed that the Commission wished to approve article 9 as it stood.

21. *It was so agreed.*

Article 10 (A/CN.9/408, annex)

22. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) emphasized that the article referred to the assignment of proceeds and not to the assignment of an undertaking. As before, references in the text to paragraph 7 (1) should read 7 (2).

23. **Mr. FAYERS** (United Kingdom), referring to paragraph (1), asked what was the background of the provision that the agreement not to assign the proceeds of a guarantee need not be in the form stipulated in paragraph 7 (2), which presumably meant that an oral agreement would be possible. He doubted whether that would be the correct procedure.

24. The wording "if the guarantor/issuer or another person obliged to effect payment has received a notice of the beneficiary", in paragraph (2) confined the giving of notice to the beneficiary, who was the assignor. Under English law notice could also be given by the assignee, who was the main interested party in giving the notice. He asked the reasons for that restriction.

25. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) referred to the decision of the Working Group reflected in paragraph 32 of the main body of the document under discussion, namely, that it was not necessary to add additional references to a form requirement in paragraph (1) with respect to a waiver of the right to assign proceeds. That raised the question of whether the phrase "or elsewhere agreed by the guarantor/issuer" in paragraph (1) was appropriate. The Working Group had also affirmed that notice of assignment, in order to be reliable, needed to originate from the beneficiary, and that partial assignment was not precluded.

26. **Mr. KOZOLCHYK** (United States of America), replying to the question raised by the representative of the United Kingdom, said the reason why the beneficiary was the notifying party was that the assignment would not be effective unless there was compliance by the beneficiary with the terms of the bank guarantee or stand-by letter of credit.

27. **Ms. FENG Aimin** (China) said that the text of article 10 was acceptable to her delegation. With regard to the right of the beneficiary, the assignee had no right to know the source of the payment. Notice given by the beneficiary asking the bank to pay the money to the assignee was sufficient, as had just been explained by the United States representative.

28. **Mr. CHOUKRI SBAI** (Observer for Morocco) pointed out that it was a mandatory provision that notice be sent by the beneficiary, for a number of important reasons. Firstly, the parties to the undertaking numbered three — the guarantor, the principal/applicant and the beneficiary, and the assignee was not a party to the undertaking. The second reason was that the risk of theft or loss of the undertaking arose, and greater safety would be ensured by providing that only the beneficiary could send the notice. The third reason was that an irrevocable assignment could be carried out only by the beneficiary. His delegation considered that the line taken by the Working Group on the matter had been the right one.

29. **Mr. ILLESCAS** (Spain) said his delegation too could accept the formulation of article 10 proposed by the Working Group. There were sound arguments for restricting notice of assignment to the beneficiary since, in an international context, the assignee might be completely unknown to the guarantor/issuer, whereas the beneficiary would, at some point at least, be known.

30. The irrevocability of the assignment was a matter of great importance where the obligor's discharge from liability was concerned, and he suggested that attention should be drawn to that point by amending the title of the article to read "Irrevocable assignment of proceeds".

31. **Mr. EDWARDS** (Australia) said that the formulation "... has received a notice of the beneficiary" was misleading. He would prefer the expression "... a notice originating from the beneficiary", in line with the expression used by the Working Group in paragraph 32 of the main body of the document.

32. **Mr. HERRMANN** (Secretary of the Commission) said that the wording in paragraph (1) had been chosen by the Working Group, not by the Secretariat. He noted that in the area of receivables financing, on the question of assignment of claims, it was suggested that in order to be effective, such assignment could be made by notice of the assignor or with the authorization of the assignor from the assignee. Such a solution would be a possible way out of the dilemma. The wording "has received a notice of the beneficiary" might be meant to imply notice received not directly but through an intermediary. However, the expression "originating from" should be sufficient to meet the need for reliability and would be consistent with terms used earlier.

33. **Mr. FAYERS** (United Kingdom) said that, while he could accept the formulation "notice of the beneficiary", that had not been acceptable to some delegations, which had considered that notice should come from the assignor. The wording should make it clear that notice could be given by the beneficiary if that was indeed the intention, since the wording as it stood might be interpreted as not preventing notice being given by the assignee — which, as he understood it, had not been the intention of some members of the Working Group.

34. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said that the policy question was whether the notice must originate from the beneficiary or whether a broader provision should apply.

35. **Mr. BYRNE** (United States of America) agreed that it had been the Working Group's position that, because the species of undertaking embodied in a letter of credit or independent guarantee was a special obligation towards a named person, only the named beneficiary could make a drawing and make an enforceable, irrevocable assignment of proceeds. A notice originating from the assignee would in practice be ignored by a bank as lacking authority. The principle to be preserved was the entitlement or right of the beneficiary alone to be paid. That had been the Working Group's intention, and it should be reflected in the draft.

36. **Mr. KOZOLCHYK** (United States of America) said that confusion had arisen because the term "notice" covered two separate documents. The first was the beneficiary's irrevocable order to the bank to make payment, which could come only from the beneficiary, and the second was the confirmation sought from the bank by the assignee that he would receive payment.

37. **Mr. FAYERS** (United Kingdom) said that article 10 (2) dealt with the notice given to the bank as to who was to be paid; under English law that particular notice could be given by the assignee, who was in fact the party with the chief interest in giving such notice. His own position was that the provision should not be restricted to the assignor, but if it was the Commission's wish to make the provision more restrictive, and more in line with United States law on the matter, the wording should be clarified.

38. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) stressed that article 10 was not intended as a codification of the law on assignment of proceeds. Paragraph (1) covered the assignability of proceeds. Paragraph (2) dealt with the specific question of when the guarantor/issuer could consider that he had discharged his obligation under law. The question under discussion was whether notice on that point had to originate from the beneficiary alone.

39. **Ms. ASTOLA** (Finland) said that, as she saw it, the important issue was that the beneficiary should consent to the assignment. She had interpreted the expression "has received a notice of the beneficiary" to mean that notice could come from any person, given the consent of the beneficiary.

40. **Mr. BYRNE** (United States of America) said that his delegation's position on the matter was not influenced by United States law on assignments. However, United States law on assignments, though very similar to that of the United Kingdom, differed radically from the law governing the assignment of proceeds under letters of credit, which was mercantile law. The general principle of commercial law that everything could be made assignable did not obtain, because the person with whom the guarantor/issuer was dealing was usually a stranger, and thus the risk of paying the wrong person and having to make double payment would be borne either by the guarantor/issuer or in most cases by the applicant.

41. The banks had therefore instituted very careful procedures, which included three elements: first, a request on the part of the beneficiary for an assignment of proceeds, following which the bank would require the beneficiary to produce the original letter of credit and to state irrevocably to whom the payment was to be made. The second element might be, as pointed out by the United Kingdom representative, a further notice requesting acknowledgement. The third element, which was of most value to the assignee, was acknowledgement from the bank that it had recognized the assignment. The Commission was not trying to set up a universal scheme to regulate the assignment of proceeds, but was rather trying to clear up confusion regarding discharge of obligation under an international instrument, which would be of great use commercially throughout the world.

42. The critical principle that was addressed in paragraph (2) was that consent to the assignment must originate from the named beneficiary, since otherwise there would be risk of double payment, fraud or forgery.

43. **Ms. CZERWENKA** (Germany) said she had understood article 10 (2) as a very basic, uncontroversial rule, covering the issue of the conditions under which the guarantor/issuer could pay to the assignee and be discharged from liability. The Commission should not try to deal with other matters relating to assignment law in general. In her delegation's view the provision could be very restrictive, stating simply that the notice to the guarantor/issuer must stem from the beneficiary. The liability would then be discharged by payment to the person named. The question whether the guarantor/issuer could rely on any other notice that he might receive did not come within the scope of the Convention.

44. **Ms. FENG Aimin** (China) endorsed the views of the representatives of the United States and Germany.

45. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said he believed it to be the prevailing view in the Commission that notice of assignment, to be acceptable, must be offered by the beneficiary. Accordingly, unless he heard otherwise, he would take it that the Commission wished the text of paragraph (2) to express that principle and that the text be referred to the drafting group on that understanding.

46. *It was so agreed.*

The meeting was suspended at 3.45 p.m. and resumed at 4.10 p.m.

47. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) reminded the Commission of the suggestion by Spain that the word "irrevocable" should be inserted before the word "assignment" in the title of article 10. The notion of irrevocability appeared in paragraph (2) but not in paragraph (1); moreover, in some countries, certain kinds of assignment were irrevocable whereas others were not, and also article 49 of the UCP rules did not speak of irrevocability in regard to assignments of the proceeds of documentary credits. He therefore asked the Commission to consider whether, in regard to the proceeds of instruments covered by the Convention, it intended article 10 to apply to irrevocable assignments alone.

48. **Mr. BYRNE** (United States of America) said he believed that the article should so apply. In any case, the proceeds of instruments covered by the Convention were contingent and consequently their assignment — in reality an irrevocable payment order — was of limited commercial value; if it was to be revocable as well, that value would become little more than illusory. He therefore supported the Spanish suggestion, as a means of drawing attention to the particular nature of the assignments contemplated in article 10.

49. **Ms. BAZAROVA** (Russian Federation) said that the inclusion of the word "irrevocable" in the title drew attention to an element that it was unnecessary to emphasize, but that her delegation would not oppose the change. Assignment of the proceeds under discussion was a straightforward matter: if the obligor was a bank, an instruction to it from the beneficiary to pay someone else would suffice.

50. **Ms. FENG Aimin** (China) agreed that it was unnecessary to stress the element of irrevocability. The title was adequate as it stood, and changing it would not alter the obligor's position. The important point was that article 10 should ensure that, if the beneficiary assigned the proceeds, his instructions would be carried out.

51. **Mr. ILLECAS** (Spain) said that article 49 of the UCP 500 rules was irrelevant to the Commission's consideration of the issue because it referred the effects of assignment to rules of national law. The Convention, on the other hand, established rules of universal application, and in the case of article 10 they were those applicable to the specific effects of the assignment. Under that article, if the guarantor made payment by means of an irrevocable assignment, it was discharged from its liability, something quite different from what was covered by article 49 of the UCP 500 rules.

52. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said that the Commission might intend paragraph (1) to mean that a beneficiary could make either an irrevocable or a revocable assignment, while paragraph (2) might be intended to specify what would happen if the beneficiary made an irrevocable assignment. That intention would be expressed by the present wording of paragraph (1), and therefore the title should not be changed. Although titles were not substantive law, the inclusion of "irrevocable" would imply that a similar qualification would also apply to paragraph (1). Unless he heard any objection, he would take it that the Commission wished the title to remain unchanged.

53. *It was so agreed.*

Article 11 (A/CN.9/408, annex)

54. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) reminded the Commission that references to "article 7 (1)" should be read as "article 7 (2)".

55. In considering article 11, it should be remembered that cessation of the right to demand payment did not necessarily occur at the same time as expiry of the validity period of the undertaking.

56. **Ms. ASTOLA** (Finland) pointed out that, under article 8 (1), an undertaking could be amended in a form other than that prescribed in article 7 (2). If the parties could amend an undertaking orally, they should be able to terminate it orally as well. She suggested that article 11 (1) be modified to permit that, leaving it to the relevant rules of evidence to determine whether or not termination had taken place.

57. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) pointed out that the Working Group, at its twenty-first session, had decided that purely oral termination should not be allowed (document A/CN.9/391, paragraph 77).

58. **Ms. CZERWENKA** (Germany) said that her delegation could agree that the wording of paragraph (1) (b) should be aligned with that of article 8 (1), so as to enable oral termination to take place where the undertaking so provided.

59. Paragraph 1 (c) raised the question of revolving guarantees. It stipulated that the right to demand payment under the undertaking ceased when the amount available had been paid, unless there was provision for automatic renewal. In her view that was illogical because, if there was automatic renewal, full payment could never be made. She therefore proposed deletion of the words "unless the undertaking provides for the automatic renewal or for an automatic increase of the amount available or otherwise provides for continuation of the undertaking". In any case the matter of revolving credits should not be overemphasized.

60. **Mr. MARKUS** (Observer for Switzerland) said that criticism had been directed in his country to the contradictions inherent in the combined effect of paragraph (1) (a) and (b) and paragraph (2). He asked how article 11 would operate where an undertaking stipulated that it must be returned to the sender for cessation of effectiveness and the beneficiary sent the guarantor a statement of release pursuant to paragraph 1 (a). It would be anomalous if the beneficiary were still entitled to demand payment. The reasons for cessation in paragraph (1) and paragraph (2) were mutually exclusive and should constitute alternative and not cumulative reasons for cessation of the right to demand payment.

61. **Mr. FARIDI ARAGHI** (Islamic Republic of Iran) asked whether the "statement" referred to in paragraph (1) (a) could be an oral statement. Bearing in mind the use of the words "in any form" in article 7 (2), he believed that should be the case. If not, the term "statement" should be altered to "notice" or a similar word.

62. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) remarked that article 7 (2) excluded an oral statement. He agreed that "notice" might be a more appropriate word than "statement".

63. On a point of drafting, in paragraph (1) (a) the words "statement from the beneficiary" might be preferable to "statement of the beneficiary".

64. **Ms. FENG Aimin** (China) said that the Convention did not allow undertakings to be issued in oral form; consequently it should not allow statements of release from liability to be given in that form either.

65. Paragraph (1) (c) should be retained, because of the great use made by banks of revolving guarantees.

66. **Mr. EDWARDS** (Australia) said that he too recommended using the words "statement from the beneficiary".

67. **Ms. BAZAROVA** (Russian Federation) said that it would be logical to delete the whole of subparagraph (c), in the light of the explanation given by the representative of Germany. But if the idea was to delete only the last clause, beginning with "unless", and keep the first part of the subparagraph, she would have misgivings.

68. **Ms. CZERWENKA** (Germany) explained that her delegation's proposal was to delete the latter part of the subparagraph, beginning "unless". The key issue was whether the amount available under the undertaking had or had not been paid.

69. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said it was his understanding that the term "a statement ... of release" in article 11 (a) did not permit an oral statement. It might be possible to say "a release from liability from the beneficiary in a form referred to in paragraph (2) of article 7".

70. **Ms. ASTOLA** (Finland) said that her suggestion regarding oral termination related to subparagraph (b) and was intended to mean that the undertaking could be terminated orally if there was a stipulation to that effect in the undertaking itself.

71. **Ms. BAZAROVA** (Russian Federation) asked how in such cases there would be any proof of what had occurred. She thought it would probably be better to leave the subparagraph as it was.

72. **Mr. GAUTHIER** (Chairman of the Committee of the Whole) said that the general rule would remain that termination required documentary evidence. If there was to be an exception to that rule, it would have to be stipulated. The question of proof would then be a matter for the legal systems in question.

The meeting rose at 5.05 p.m.